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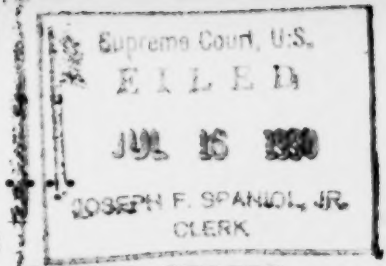

NO. .....

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

PENNHURST STATE SCHOOL
& HOSPITAL, et al.,
Petitioners

v.

TERRI LEE HALDERMAN, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED

1. Does the Due Process clause permit interpretation of a consent decree so that the phrase "active jurisdiction" means no kind of jurisdiction at all, and express provision for its cessation has essentially no consequence?

2. Does a federal district court have, through Fed.R.Civ.P. 60(b) or otherwise, inherent continuing jurisdiction over matters once properly before it, regardless of the intent of the parties or the court?

3. Can "substantial compliance" with a consent decree be interpreted, consistent with the Due Process clause, to mean compliance with its provisions for each and every one of 1600 classmembers taken individually?

NAMES OF ALL PARTIES

See Third Circuit slip op. 1 - 3 (appended hereto).

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Halderman, et al. v. Pennhurst State School and Hospital, et al, No. 74-1345, U.S.D.C. E.D. Pa., August 28, 1989 (slip op. appended hereto).

STATEMENT OF JURISDICTION

Petitioners seek review of an order of the United States Court of Appeals for the Third Circuit entered April 17, 1990. No. 89-1788, 89-1841, 89-1842. This petition is filed within ninety (90) days of that date.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND COURT RULES

United States Constitution, Amendment V (in relevant part):

> [N]or shall any person . . . be deprived of . . . property without due process of law. . . .

Fed.R.Civ.P. 60(b) (in relevant part):

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment.

STATEMENT OF THE CASE

The complaint in this case, which concerns the rights of mentally retarded persons, was filed in 1974 in the United States District Court for the Eastern District of Pennsylvania. Jurisdiction was based on 28 U.S.C. § 1331 and 1343.

A consent decree concerning habilitation services for the 1600 members of the plaintiff class was approved in 1985. Paragraph six of the decree defines that class as "all retarded persons who have resided at Pennhurst at any time on or after May 30, 1974."

The decree had been executed in 1984 as a settlement agreement by all parties to the litigation: Halderman plaintiffs, Association for Retarded

Citizens/PA (ARC/PA) plaintiffs, the United States plaintiff, Bucks County defendants, Chester County defendants, Delaware County defendants, Montgomery County defendants, Philadelphia defendants, and Commonwealth defendants.

Twice previously, this case has been before this Court. Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984); Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981). The history of this case, up to and including the district court's approval and adoption of the consent decree on April 5, 1985, is summarized at 610 F.Supp. 1221 (E.D. Pa. 1985). The subsequent history is recorded in the two hundred sixty-four (264) docket entries following the approval of the consent decree, from April 5, 1985 to June 30, 1990. These reflect motions,

orders, and other filings of a character too diverse to summarize effectively here. Pennhurst State School and Hospital closed in 1987.

The immediate events leading to the district court's order of August 28, 1989 -- the order appealed to the Third Circuit -- began on March 24, 1989, when one of the plaintiffs, Association for Retarded Citizens/Pa. (ARC/PA), filed motions "for enforcement, further orders, and extension of the Final Settlement Agreement" (emphasis added) against Delaware County defendants, Montgomery County defendants, and Commonwealth defendants. Halderman plaintiffs joined in these motions. The motions alleged a variety of violations of purported requirements of the consent decree, including, for example, some classmembers' residing in facilities

larger than plaintiffs would like.

Hearings on these motions were held on June 21, 22, 29 and July 6, 1989. On July 6, 1989, Commonwealth defendants filed a motion to dismiss all outstanding motions directed against them on the ground that, under the express terms of the consent decree, the district court had lost jurisdiction over Commonwealth defendants on July 1, 1989, and the opportunity provided in the decree for extension of jurisdiction had expired.

The district court entered an opinion and order on August 28, 1989 denying Commonwealth defendants' motion to dismiss and finding Delaware, Montgomery, and Commonwealth defendants in substantial noncompliance with the decree with respect to certain class-members, and ordering compliance by

March 1, 1990. The order also extended the effective date of certain provisions of the decree.

Commonwealth defendants, Montgomery County defendants and Delaware County defendants timely appealed to the United States Court of Appeals for the Third Circuit. These appeals were subsequently consolidated.

On April 17, 1990, the Third Circuit affirmed the district court's order. The Circuit held that the phrase "active jurisdiction" in the consent decree means only "active supervision," so that its loss would not deprive the district court of jurisdiction. The Circuit also held that "substantial compliance" must be measured against each classmember individually rather than against the class as a whole; under such definition, Commonwealth defendants

and Montgomery and Delaware County defendants were found not to be in substantial compliance with the decree.

REASONS FOR GRANTING THE WRIT

Each of of the three issues here relates directly to the burden on federal courts.

I. "ACTIVE JURISDICTION" MUST MEAN SOME KIND OF JURISDICTION; THAT PHRASE IN A CONSENT DECREE CANNOT PROPERLY BE INTERPRETED TO MEAN "SUPERVISION" MERELY

Although ¶14 of the consent decree imposes certain permanent obligations on defendants, it does not permit enforcement of these obligations to remain permanently in federal court. The consent decree at ¶14 expressly provides for the cessation of "active jurisdiction" on July 1, 1989 (absent certain findings made prior to July 1, 1989 pursuant to ¶15).[1] Slip op. at 13.

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[1] The Third Circuit did not address the claim that an amendment to the consent decree extended this date into 1990. Slip op. at 21, n.15.

The Third Circuit interpreted the phrase to be equivalent to "active supervision," slip op. at 19, thereby transforming the word "jurisdiction" into the word "supervision," a maneuver not permitted under United States v. Armour, 402 U.S. 673, 682 (1971) (consent decree must be construed "as it is written").[2] As a matter of due process, a party to a consent decree is entitled to believe that the word "jurisdiction" means "jurisdiction" (of some kind surely), not "supervision," Armour; the qualification "active" cannot transform jurisdictional gold into supervisory lead. The Circuit's opinion deprives the explicit cessation of "active jurisdiction" of any

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[2] The Third Circuit, of course, purports to follow Armour, Slip op. at 16.

practical consequence, obviously not an intention which can be fairly imputed to the parties.[3]

If the Circuit holding is allowed to stand, defendants in major federal litigation will be increasingly reluctant to enter into settlement agreements or consent decrees, as they could not reasonably rely on the terms of any agreement, thereby increasing the load of litigation on federal district courts.

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[3] The Third Circuit's interpretation of "active jurisdiction" is especially remarkable because the district court, in its 1985 opinion approving the settlement, treated "active jurisdiction" as fully equivalent to "jurisdiction," and it did so three (3) times. 610 F.Supp. at 1228, 1231, 1232.

II. FEDERAL DISTRICT COURTS DO NOT HAVE INHERENT JURISDICTION OVER MATTERS ONCE PROPERLY BEFORE THEM REGARDLESS OF THE INTENT OF THE PARTIES OR THE COURT

If, as petitioners here believe, the consent decree's terms ended district court jurisdiction on July 1, 1989, the question of inherent continuing jurisdiction must be reached.[4] Whether federal district courts have inherent jurisdiction over matters once properly

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[4] Because of its interpretation of "active jurisdiction," the Third Circuit did not reach this issue. Slip op. at 11-12. Because this issue was briefed by both sides in the Circuit, however (see Brief of ARC/PA at 21-26 and Reply Brief of Commonwealth Defendants at 1-2), this issue can properly be considered without departing from the usual rule that this "Court ordinarily does not consider matters neither raised before nor decided by the courts below." United States v. Mendenhall, 446 U.S. 544, 551 n.5 (1980) (emphasis supplied).

before them, regardless of the intent of the parties or the court, is a matter never addressed by this Court.

The circuits that have addressed the matter have split. McCall-Bey v. Franzen, 777 F.2d 1178, 1186 (7th Cir. 1985) (no inherent jurisdiction); Fairfax Countywide Citizens Assn. v. County of Fairfax, 571 F.2d 1299, 1303 (4th Cir. 1978) (no inherent jurisdiction); Aro Corp. v. Allied Witan Co., 521 F.2d 1368, 1371 (6th Cir. 1976) (inherent continuing jurisdiction; Fed.R.Civ.P. 60(b)(6) permits court to vacate a dismissal and enforce a settlement); see Solimine, Enforcement and Interpretation of Settlements of Federal Civil Rights Actions, 19 Rutgers L.J. 295, 305 (1988) ("Presumably, all . . . circuits [other than the Fourth and Seventh] follow the Aro rule.") So

vexing is this issue that it has even produced intracircuit conflict. See slip op. at 11-12; and compare Kent v. Baker, 815 F.2d 1395 (11th Cir. 1987) with Londono v. City of Gainsville, 768 F.2d 1223, 1227 (11th Cir. 1985).

Petitioners believe the Seventh Circuit's opinion in McCall-Bey (per Posner, J.) and the Fourth Circuit's in Fairfax is the better view, and urge its adoption here: unless there is intent to retain jurisdiction, claims of violation of settlement agreements must be litigated in state, not federal, courts (absent an independent basis for federal jurisdiction). McCall-Bey, 777 F.2d at 1186-1187. Here, intent existed to retain jurisdiction for a limited time, which expired on July 1, 1989. Any enforceable legal obligations extending beyond that date could be

enforced only in state court.

III. "SUBSTANTIAL COMPLIANCE" WITH A CONSENT DECREE COVERING A CLASS WITH 1600 CLASSMEMBERS CANNOT REASONABLY MEAN COMPLIANCE FOR EACH CLASS-MEMBER TAKEN SEPARATELY AND INDIVIDUALLY

It may well be possible to manufacture 1600 computer chips to a customer's exact specifications, but 1600 residential placements of and 1600 day programs for 1600 classmembers will not -- as a matter of ordinary experience and common sense -- continuously in all cases satisfy plaintiffs. But it is exactly this universal and continuous satisfaction of all plaintiffs that the Third Circuit demands. Slip op. at 28. That is "full compliance," not "substantial compliance," but the Third Circuit fails to recognize the difference.

To combine (1) the Circuit's jurisdictional holding (jurisdiction retained for as long as classmembers live) with (2) its definition of "substantial compliance" (each of 1600 classmembers must receive "appropriate" residential placement and day programs) with (3) professional disagreement about what appropriate care requires, see Youngberg v. Romeo, 457 U.S. 307 (1982),[5] is to create a machine for the manufacture of interminable litigation.

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[5] "Professionals in the habilitation of the mentally retarded disagree strongly on the question whether effective training of all severely or profoundly retarded individuals is even possible." 457 U.S. at 316 n.20.

That is precisely what the Third Circuit has done.[6]

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[6] This is not mere speculation. Subsequent to the entry of the consent decree in 1985, there have been 264 docket entries in the district court. The Circuit's holding simply extends this litigation to the year 2050 (estimated date of death of the last classmember).

CONCLUSION

Because of the significance these issues have for the federal judiciary, certiorari should be granted.

Respectfully submitted,

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Date: July 16, 1990

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Filed: April 17, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-1788, 89-1841 & 89-1842

TERRI LEE HALDERMAN, a retarded citizen, by her mother and guardian, Winifred Halderman; LARRY TAYLOR, a retarded citizen, by his parents and guardians, Elmer and Doris Taylor; KENNY TAYLOR, a minor, a retarded citizen, by his parents and guardians, Elmer and Doris Taylor; ROBERT SOBETSKY, a minor, a retarded citizen, by his parents and guardians, Frank and Angela Sobetsky; THERESA SOBETSKY, a retarded citizen, by her parents and guardians, Frank and Angela Sobetsky; NANCY BETH NOWMAN, a retarded citizen, by her parents and guardians, Mr. and Ms. Horace Nowman; LINDA TAUB, a retarded citizen, by her parents and guardians, Mr. and Mrs. Allen Taub; GEORGE SOROTOS, a minor, a retarded citizen, by his foster parents, William and Marion Caranfa, all of the above individually and on behalf of all others similarly situated; THE PARENTS AND FAMILY ASSOCIATION OF PENNHURST

PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZEN, JO SUZANNE MOSKOWITZ, a minor, by her parents and next friends, Leonard and Nancy Moskowitz, ROBERT HIGHT, a minor, by his parents and next friends, John and Jeanne Hight, DAVID PREUSCH, a minor by his parents and next friends, Calvin and Elizabeth Preusch, and CHARLES DiNOLFI, on behalf of themselves and all others similarly situated,

Plaintiffs-Intervenors

UNITED STATES OF AMERICA, Plaintiff-Intervenor

vs.

PENNHURST STATE SCHOOL & HOSPITAL, DEPARTMENT OF PUBLIC WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA, FRANK S. BEAL, Secretary of the Department of Public Welfare, STANLEY MEYERS, Deputy Secretary for Mental Retardation, Department of Public Welfare, HELENE WOHLGEMUTH, Former Secretary, Department of Public Welfare, ALDO COLAUTTI, Executive Deputy Secretary, Department of Public Welfare, WILBUR HOBBS, Deputy Secretary for Southeastern Region, Department of Public Welfare, RUSSELL RICE, JR., Commissioner of Mental Retardation for Southeastern Region, Department of Public Welfare, C. DUANE YOUNGBERG, Superintendent, Pennhurst State School & Hospital, ROBERT SMILOVITZ, Former Assistant Superintendent, Pennhurst State School & Hospital, JOSEPH FOSTER, Assistant Superintendent, Pennhurst State School & Hospital, MARGARET GREEN, BETTY UPHOLD, ALICE BARTON, P.E. KLICK, DR. PAROCCA, HELEN FRANCIS, employees and agent of Pennhurst State School & Hospital, JOHN DOCTOR, JAMES NURSE, JANE AIDE, JILL THERAPIST, RICHARD ROE, JANE DOE, unknown and unnamed staff, employees and agents of Pennhurst State School & Hospital, each individual Defendant sued individually and in his or her official capacity, GEORGE HETZGER, JOSEPH CATANIA, and ROGER BOWERS, Commissioners for Bucks County, ROBERT STREBL, EARL BAKER and LEO McDERMOTT, Commissioners for Chester County, FAITH R. WHITTLESEY, CHARLES KELLER, and WILLIAM SPINGLER, Commissioners for Delaware County, A. RUSSELL PARKHOUSE, FRANK

W. JENKINS and LAWRENCE H. CURRY, Commissioners for Montgomery County, MAYOR FRANK L. RIZZO and THE CITY OF PHILADELPHIA, as Authorities for Philadelphia County, PETER BODENHEIMBER, Mental Health/Mental Retardation Administration for Bucks County, WILLIAM A. McKENDRY, Mental Health/Mental Retardation Administrator for Chester County, P. PAUL BURRICHTER, Mental Health/Mental Retardation Administration for Delaware County, HERMAN A. ROETHER, Mental Health/Mental Retardation Administration for Montgomery County and LEON SOFFER, Mental Health/Mental Retardation Administrator for Philadelphia County

Pennhurst State School and Hospital, the Department of Public Welfare, Secretary of Public Welfare, the Deputy Secretary of Mental Retardation, the Executive Deputy Secretary of Public Welfare, the Deputy Secretary for Southeast Region, the Commissioner for Mental Retardation for Southeast Region, the Superintendent for Pennhurst State School and Hospital and the Employees and Agents for Pennhurst State School and Hospital,

Appellants No. 89-1788

Commissioners and Mental Health/Mental Retardation Administrator of Montgomery County, Pennsylvania

Appellants No. 89-1841

The Mental Health/Mental Retardation Administration and County Council of Delaware County, Pennsylvania

Appellants No. 89-1842

On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil No. 74-1345)

Argued March 1, 1990

Before: HUTCHINSON and COWEN, *Circuit Judges*, and LECHNER, *District Judge**

(Filed April 17, 1990)

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---

*The Honorable Alfred J. Lechner, Jr., United States District Judge for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

COWEN, *Circuit Judge.*

Today we revisit the seemingly endless litigation

over the closing of Pennhurst State School and Hospital ("Pennhurst"). In March 1989, the Association of Retarded Citizens/Pennsylvania ("ARC/PA") moved the district court for enforcement of a settlement agreement entered into by all the parties to this litigation six years ago which supposedly ended their dispute. After holding evidentiary hearings on the motion, the district court entered an order finding the various state defendants in this action (whom we will refer to collectively as "the Commonwealth"), the Montgomery County defendants ("Montgomery County"), and the Delaware County defendants ("Delaware County") in substantial noncompliance with the agreement and its court order incorporating the agreement. The Commonwealth and the two Counties now appeal the district court's order, as well as the denial of their motions to dismiss due to the court's lack of subject matter jurisdiction. Because we find that the district court had subject matter jurisdiction and did not err in finding the Commonwealth and the Counties in substantial noncompliance, we will affirm.

I.

BACKGROUND

The Pennhurst case has a long and complex procedural history.[1] It suffices for our purposes to note that the original complaint was filed in 1974 as a class action by Terri Lee Halderman against the Commonwealth, Delaware County, Montgomery County, and various officials of three other counties.[2]

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1. For a discussion of the history of this litigation, see *Halderman v. Pennhurst State School and Hosp.*, 610 F. Supp. 1221, 1224-1226 (E.D. Pa. 1985).

2. The plaintiff class as certified by the district court, consisted of all retarded persons residing at Pennhurst as of May 1974,

The ARC/PA intervened as a party plaintiff in 1975.[3] The case was actively litigated for eleven years, producing 28 published opinions and three arguments before the United States Supreme Court.

Ultimately, all parties conceded that Pennhurst was not providing adequate care and habilitation to its retarded residents. On July 12, 1984, under the guidance of Judge Rosenn of this Court, the parties reached a settlement. In approving the settlement agreement--titled and referred to by the parties as the Final Settlement Agreement ("FSA")--the district court explained that:

> the Commonwealth and County defendants have agreed to provide community living arrangements to those members of the plaintiff class for whom such placement is deemed appropriate by the individual planning process, together with such community services as are necessary to provide each person with minimally adequate habilitation, until such time as the retarded individual no longer is in need of such living arrangements and/or community services. The defendants agree to provide residential and habilitative services to all persons who have been furnished with such services pursuant to prior orders of this Court. The defendants agree to develop and provide a written

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persons "who are on a waiting list for placement at Pennhurst," and persons residing in the defendant counties but "who, because of the unavailability of alternative services in the community, may be placed at . . . Pennhurst . . . ." *Halderman v. Pennhurst State School and Hosp.*, 610 F. Supp. 1221, 1228 (E.D. Pa. 1985). The settlement agreement amended the certified class to exclude persons who were either on a waiting list or who might have been, but were not, placed at Pennhurst. We will refer collectively to this latter class as the "Halderman plaintiffs" or the "plaintiff class."

3. ARC/PA's name in 1975 was the Pennsylvania Association for Retarded Citizens.

> habilitation plan, formulated in accordance with professional standards, to each member of the plaintiff class; provide an individualized habilitation program to each member of the plaintiff class; and permit each class member and his family or guardian to be heard in connection with his or her program. The defendants also agree to provide an annual review of each person's individualized habilitation program, and to monitor the services and programs provided to the class members in accordance with a detailed, professionally-established monitoring and visitation procedure. All defendants shall assure that all persons provided with services under the terms of the agreement shall be afforded: (1) protection from harm; (2) safe conditions; (3) adequate shelter and clothing; (4) medical, health-related, and dental care; (5) protection from physical and psychological abuse, neglect, or mistreatment; (6) protection from unreasonable restraint and the use of seclusion; and (7) protection from the administration of excessive or unnecessary medication.

Halderman v. Pennhurst State School and Hosp., 610 F. Supp. 1221, 1227 (E.D. Pa. 1985).

The basic structure of the FSA is relevant to the resolution of this appeal. The FSA consists of four sections: the main body of the agreement, consisting of 22 paragraphs containing general obligations of the parties, conditions and definitions; Appendix A, which sets forth the specific obligations of the Commonwealth and the Counties as detailed in the district court's opinion quoted above; Appendix B, which allocates the funds made available by the closure of Pennhurst, establishes both a cost review procedure for the individual habilitation plans and a funding dispute resolution mechanism, and contains an

application for federal funding; and Appendix C, which concerns the required notice to members of the class.

In March 1989, the ARC/PA filed several motions with the district court, joined in by the Halderman plaintiffs, for "Enforcement, Further Orders and Extension of the Final Settlement Agreement" as to the Commonwealth, and Montgomery and Delaware Counties. After holding evidentiary hearings over a period of four days between June 21 and July 6, 1989, the district court found that the Commonwealth and both Counties were in substantial noncompliance with the FSA. Specifically, the court found that Montgomery County was not providing the habilitative services mandated by the FSA to six members of the class, App. at 811-12, and that Delaware County was not providing the required habilitative services to 68 members of the class, App. at 810. In addition, the court found that the Commonwealth was in substantial noncompliance with the FSA because it was jointly responsible with the Counties for providing the habilitative services to the class members and also because it was failing to provide the necessary monitoring of the Counties' compliance. App. at 809, 811, 813-14.

The district court rejected the Appellants' arguments that under the terms of the FSA, the district court had lost jurisdiction over the case. First, the court found that the contractual obligations of Appendix A were, in effect, court orders. App. at 814-16. Second, the court found that the terms of the FSA--specifically ¶¶14-16--are unambiguous and provide the court with continuing jurisdiction to enforce its Appendix A orders. App. at 812-13. Alternatively, the court found that it had jurisdiction over the case, at least as to the Commonwealth, pursuant to a December 2, 1989 amendment of the FSA. App. at 812. The court interpreted the

amendment as extending the jurisdictional period contained in the FSA to sometime in 1990.[4]

The district court entered an order on August 28, 1989, requiring the Commonwealth and the Counties to comply with all provisions of the FSA by March 1, 1990. App. at 801.[5] In addition, the court ordered that ¶¶10, 12-16, 18 and 21 of the main text of the FSA and ¶¶A5(c), A5(e) and A8 of Appendix A "shall remain in full force and effect notwithstanding any language contained therein calling for earlier expiration . . . ." App. at 802. The district court further ordered that the Commonwealth and the Counties are to file monthly progress reports to the court until they come into full compliance. App. at 802.

On appeal, the Commonwealth and the Counties

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4. The FSA originally provided that Pennhurst would be closed on July 1, 1986. The amendment on December 2, 1986, as to which only the Halderman plaintiffs, the ARC/PA, the Commonwealth and Philadelphia County were parties, extended the date for the closing of Pennhurst until October 31, 1986. The amendment also was apparently meant to change the dates on which the district court was to lose "active jurisdiction" over the case. Paragraph 7 reads:

> The time for ending the Court's active jurisdiction set forth in the [FSA] is hereby tolled until the last resident of the Defendant County or out-of-region counties leaves Pennhurst for an appropriate community placement, at which time the specified time period shall continue to run. Provisions of the [FSA] not otherwise affected by this Amendment shall remain unchanged.

App. at 56-57. Sometime after the December 2, 1986 amendment, a stipulation was approved by the court again extending the date of closure until October 26, 1987. Pennhurst was finally closed on October 27, 1987.

5. In its opinion, the district court noted that its initial reaction was to find the Commonwealth and the two Counties in contempt for violating the court's orders in Appendix A, but reconsidered after recognizing that a majority of the 1200 former Pennhurst residents covered by the FSA had already been helped by the Appellants' efforts at compliance.

contest both the district court's denial of their motions to dismiss on the jurisdiction issue and the court's finding that they are in substantial noncompliance with the FSA. On the compliance issue, the Commonwealth argues that, under state law, the Counties have the sole responsibility to place the class members in community living arrangements. In addition, the Commonwealth argues that the evidence presented at the hearing showed that it was providing the required monitoring services under the FSA. Montgomery County does not dispute that six members of the class from its county are not being provided the care mandated by the FSA, but contends that since 194 of the 200 former Pennhurst residents from Montgomery County are being properly cared for, the County is in substantial compliance. Likewise, Delaware County does not dispute the district court's finding that 68 members of the class from its county are not being provided the services mandated by the FSA. Rather, Delaware County's argument is that its obligations under the FSA are conditioned upon adequate funding from the Commonwealth which has not been forthcoming.[6] We have jurisdiction over these appeals pursuant to 28 U.S.C. § 1291 (1982).

II.

JURISDICTION

The first issue we address is the jurisdictional one. This circuit has not yet conclusively settled the question of whether courts have inherent jurisdiction to enforce settlement agreements in cases that were once properly before them. *Compare Fox v. Consol. Rail Corp.*, 739 F.2d 929, 932 (3d Cir. 1984), *cert.*

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6. We note that none of the Appellants has raised as an issue the remedial provisions contained in the district court's August 1989 order.

denied, 469 U.S. 1190 (1985) *and Kelly V. Greer*, 365 F.2d 669, 671 (3d Cir. 1966), *cert. denied*, 385 U.S. 1035 (1967) *with Washington Hosp. v. White*, 889 F.2d 1294, 1298-99 (3d Cir. 1989). Under either view, the district court retained jurisdiction over the case *sub judice*. Its order approving the FSA under Fed. R. Civ. P. 23(e) reads in relevant part:

> IT IS HEREBY ORDERED that the Final Settlement Agreement is APPROVED, and IT IS FURTHER ORDERED that the provisions of the Final Settlement Agreement executed on July 12, 1984 heretofore made a part of the record in this case shall have the full force and effect of an order of this Court.

App. at 53. Thus, the district court not only approved the FSA, but incorporated it into an order of the court. *Cf. White* 889 F.2d at 1299 ("a stipulated agreement signed by the court does allow a district court to retain jurisdiction"); *McCall-Bey v. Franzen*, 777 F.2d 1178, 1188-89 (7th Cir. 1985) (district court had jurisdiction to enforce a settlement agreement when the court's "order of dismissal states that it is pursuant to the parties' stipulation; the stipulation states that the dismissal is pursuant to the terms and conditions in the settlement agreement; and one of those terms is the sentence ['the parties retain their rights to petition the Court regarding any breach or violation of this agreement.']").[7] As the Court of Appeals for the Seventh Circuit has explained:

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7. *See also United States v. Baus*, 834 F.2d 1114, 1127 n.13 (1st Cir. 1987) (noting that some courts have held "that while federal courts necessarily have the power to vacate their own judgments, they do not necessarily have jurisdiction to hear collateral disputes arising under state contract law, *at least not where the district court has not explicitly retained jurisdiction or where the district court has not approved of the settlement agreement and incorporated it into an order of the court* . . . .") (emphasis added) (citations omitted).

> [Although] we have rejected the suggestion that federal judges have inherent power to enforce settlement agreements arising out of lawsuits that were once before them[,] . . . we have expressed no doubt of the power of a district court to dismiss a lawsuit conditionally, retaining jurisdiction to effectuate terms of settlement agreed to by the parties. Nor do we think there is any magic form of words that the judge must intone in order to make the retention of jurisdiction effective. All that is necessary is that it be possible to infer that he did intend to retain jurisdiction--that he did not dismiss the case outright, thereby relinquishing jurisdiction.

McCall-Bey, 777 F.2d at 1188.

Even though the district court retained jurisdiction, however, the Appellants argue that under the explicit terms of the FSA such jurisdiction was for a limited time period and that that period expired before the district court entered its findings in August 1989. The FSA's built-in jurisdictional component is found in ¶¶14 and 16 of the main body of the text:

> 14. Subject to paragraphs 15 and 16 below, the parties agree that as of the dates specified in those paragraphs, the District Court will mark this case closed and settled, will vacate the judgment and all orders of the Court except those in Appendix A, which shall remain in effect permanently (subject to Fed. R. Civ. P. 60(b)), and will cease to have active jurisdiction of this case. . . .
>
> . . . .
>
> 16. The parties desire that there be an orderly transition to the cessation of active jurisdiction specified in Paragraph 14. For each of the five sets of County Defendants . . . the "date specified" in

> Paragraph[] 14 . . . shall be two years after the last of each of the County's residents leaves Pennhurst. For the Commonwealth Defendants, the "date specified" in Paragraph[] 14 . . . shall be July 1, 1989.

App. at 23-24.

The Commonwealth argues that under the terms of ¶16 of the FSA, the "date specified" in ¶14 (on which the court "will mark this case closed and settled" and "cease to have active jurisdiction" with regard to the Commonwealth) was July 1, 1989. App. at 23. Since ¶14, according to the Commonwealth's interpretation, states that, as of the "date specified," the district court ceases "active jurisdiction" over the case, the court lost jurisdiction to decide the compliance issue before it issued its August 1989 findings and order.

Likewise, Delaware County argues that the last of its residents left Pennhurst on April 2, 1987 and, therefore, according to ¶¶14 and 16 the district court lost jurisdiction over the case, *vis-a-vis* Delaware County, on April 2, 1989, i.e., two years later. This was well before the court's August 1989 findings and order. Similarly, the last Montgomery County resident left Pennhurst in August 1986, so the County argues that the district court lost jurisdiction over the case, *vis-a-vis* Montgomery County, in August 1988, one year before the district court rendered its decision in the instant case.[8]

ARP/PA and the Halderman plaintiffs counter that under the FSA, the district court retained subject matter jurisdiction over the case in order to enforce the obligations agreed to by the parties under Appendix A. According to the Appellees, the district court simply

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8. In effect, the Commonwealth and the Counties are urging us to read the term "active jurisdiction" in ¶14 to mean simply "jurisdiction."

ceased *active* jurisdiction over the case as of the dates specified in ¶16. The ARP/PA and the Halderman plaintiffs urge us to read the term "active jurisdiction" to mean simply "*active* supervision."

In resolving this dispute, we treat the FSA as a contract. *See White*, 889 F.2d at 1300; *Fox v. United States Dep't of Housing*, 680 F.2d 315, 319 (3d Cir. 1982) ("[a]lthough consent decrees are judicial acts, they have many of the attributes of contracts voluntarily undertaken")[9]; *Philadelphia Welfare Rights Org. v. Shapp*, 602 F.2d 1114, 1119-20 (3d Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980). The agreement should be construed consistently with fundamental precepts of contract construction. *See United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-38 (1975).

Thus, we must attempt to construe the FSA so as to give meaning to all of its words and phrases. *White*, 889 F.2d at 1300; *Rossville Salvage Corp. v. S.E. Graham Co.*, 319 F.2d 391, 395 (3d Cir. 1963) (contract construction "which gives effect and meaning to a term is to be preferred over one which makes such term mere surplusage or without effect"). Likewise, a clear provision cannot be overcome by a doubtful one, *see Kingston Dodge, Inc. v. Chrysler Corp.*, 449 F. Supp. 52, 54 (M.D. Pa. 1978), nor should a court adopt a construction that causes two reconcilable provisions to conflict, *see Keystone Fabric Laminates, Inc. v. Federal Ins. Co.*, 407 F.2d 1353, 1356 (3d Cir. 1969). *Cf. Thermice Corp. v. Vistron Corp.*, 832 F.2d 248, 252-53 (3d Cir. 1987).

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9. We note that this Court has held that a Stipulation of Dismissal that is "so ordered" by the district court is the functional equivalent, and has the same effect as, a consent order or consent decree. *Washington Hosp. v. White*, 889 F.2d 1294, 1299 & n.9 (3d Cir. 1989). *Accord Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983) ("A consent decree is essentially a settlement agreement subject to continued judicial policing") (cases cited therein).

Further, we are mindful that our task is not to reveal the "subjective intention of the parties 'but what [their] words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used.'" *Fox*, 680 F.2d at 320 (quoting Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899)). "As in statutory construction, we reject a view that would 'make a fortress out of a dictionary,' because a word or a phrase 'is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.'" *Armour*, 402 U.S. at 682. *Id.*, at 320 (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945) (L. Hand, J.), and *Towne v. Eisner*, 245 U.S. 418 (1918) (O. Holmes, J.), respectively).

Hence, in determining the meaning of the FSA's provisions our first resort is to the four corners of the agreement. *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971); *Fox*, 680 F.2d at 319. "The instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation." *Armour*, 402 U.S. at 682.[10] *See also*

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10. The Supreme Court has explained:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. . . . Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus, the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope

Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 574 (1984). The agreement memorializes the bargained for positions of the parties and should be strictly construed to preserve those bargained for positions. *See, e.g., Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983).

Applying these principles to the case *sub judice*, we find that the Appellants' proffered reading of the FSA is untenable and, according to the explicit terms of the FSA, the district court has continuing jurisdiction to enforce the Appellants' obligations under Appendix A.[11] The plain language of ¶14 of the agreement provides that the provisions of "Appendix A . . . shall remain in effect *permanently*." App. at 23 (emphasis added). The use of the word 'permanently' conveys the definite impression that the parties did not envision that the *obligations found in Appendix A* would end on certain dates in the future.[12]

The Commonwealth tries to avoid this plain language by explaining that the parties meant the obligations of Appendix A would remain in effect permanently as *moral* rather than *legal* obligations. We find this position unconvincing. It is belied by the fact that ¶14 clearly refers to the Appendix A

> of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purpose of one of the parties to it.

United States v. Armour & Co., 402 U.S. 673, 681-82 (1971) (emphasis in the original).

11. The construction of the FSA is a matter of law over which we exercise plenary review. *See, e.g., Washington Hosp. v. White*, 889 F.2d 1294, 1299 (3d Cir. 1989).

12. We find that what ceases on the "dates specified" in ¶14 is the active supervision of the district court over the rights, obligations and conditions specified in the main body of the FSA and Appendices B and C. *See* discussion, *infra*, at typescript p. 18-19.

obligations as "orders of the Court," not ethical commands. Furthermore, the Commonwealth's position flies in the face of the bracketed clause in ¶14 which states that the district court's orders in Appendix A will remain in effect permanently, although "(subject to Fed. R. Civ. P. 60(b))." There is simply no reason to have written this bracketed provision into the FSA if the parties meant the obligations of Appendix A to be only moral obligations after July 1, 1989. Moral obligations are not subject to Rule 60(b), legal ones are. If the Commonwealth and the Counties wanted to violate a moral obligation, they certainly would not have to go back to federal court seeking to reopen the case in order to do so. The fact that the parties agreed that the obligations of Appendix A were to be permanent court orders, subject to Rule 60(b), strongly implies to us that the obligations were to be continuing legal obligations enforceable by appropriate judicial authority. *See generally McCall-Bey*, 777 F.2d at 1186 ("Any time a district judge enters a judgment, even one dismissing a case by stipulation of the parties, he retains, by virtue of Rule 60(b), jurisdiction to entertain a later motion to vacate the judgment on the grounds specified in the rule, some of which have no time limit.").

The Commonwealth and the Counties contend that such a reading of the Appendix A obligations conflicts with the final phrase of the first sentence in ¶14 which states that on the dates specified the district court "will cease to have active jurisdiction of the case." They argue that the Appendix A obligations cannot be continuing legal obligations if the district court gives up its jurisdiction over the case on the dates specified.

What the Appellants' argument fails to appreciate, however, is the glaring qualification that the parties' have placed on the word "jurisdiction" in ¶14. The Appellants would have us give no effect to the word

"active" in the phrase "active jurisdiction." While admittedly not the most enlightening phrase, the fact that the parties chose to qualify the word "jurisdiction" suggests an attempt to contrast active jurisdiction with some other kind of jurisdiction, rather than no jurisdiction at all. For if the parties meant to imply that jurisdiction *per se* would end on the dates specified in ¶16, then they could have simply left the word "jurisdiction" unqualified.

So, while "active jurisdiction" is not a legal term of art, we believe it is reasonable to suppose that normal speakers of English under these circumstances, i.e., the resolution of a complex class action suit necessitating the creation of various monitoring and support mechanisms, as well as an extensive amount of court attention, would use the term to mean that after the dates specified in ¶14 the district court would cease "hands on" control over the matter and simply resort to the usual continuing jurisdiction that courts routinely exercise over their injunctions. In other words, the court would cease active supervision over the case after the dates specified. We note that the equating of "active jurisdiction" with "active supervision" is not an uncommon practice both in class action cases involving consent decrees, *see Dowell v. Board of Educ.*, 890 F.2d 1483, 1492 n.17 (10th Cir. 1989); *Vaughns v. Board of Educ.*, 574 F. Supp. 1280, 1327 (D. Md. 1983), and in other contexts as well, *see, e.g., L.H. v. Jamieson*, 643 F.2d 1351, 1354 (9th Cir. 1981) (discussing state court's jurisdiction over committed juveniles). Our construction has the benefit both of reconciling all of the provisions of ¶14 and giving meaning to all its words and phrases; while the Appellants' proffered reading would treat the qualification of jurisdiction as mere surplusage.

Moreover, in light of the district court's extensive

experience with this case and the FSA, we believe some deference is due to its conclusions about the meaning of the agreement's jurisdictional provisions. *See Keith v. Volpe*, 784 F.2d 1457, 1461 (9th Cir. 1986).[13] We simply note that the district court stated at the evidentiary hearing that:

> . . . there is no question, I think I made that absolutely clear, if you are violating any orders in the Appendix, . . . which are permanent orders, there is no question. And that--why label them permanent? What would have been the sense of a Court issuing orders that if the orders were only to be in effect for two years or three years? What kind of relief would that have been for the members of the class?
>
> That would have been a farce. And this Court did not consider the Settlement Agreement to have been a subterfuge to do something for a short period of time, and then revert back to the old methods.

App. at 341-42.

For the foregoing reasons, we reject the Appellants' reading of the FSA and accept the district court's construction as better reflecting the bargained for positions of the parties as evidenced by the four corners of the instrument.[14] Thus, we find that the

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13. Although we emphasize that given our above analysis we need not rely on the district court's view for our conclusion here.

14. Although not argued as such by any party, we also do not find the FSA to be ambiguous. To be ambiguous, an agreement must be reasonably capable of more than one construction. *White*, 889 F.2d at 1301. But it is incumbent on the Appellants to provide us with a reasonable, tenable reading of the agreement which varies from that adopted by the district court. *See Thermice Corp. v. Vistron Corp.*, 832 F.2d 248, 252 (3d Cir. 1987). *Cf. ITT*, 95 U.S. at 234, 235 (describing the first analytical step under *Armour* and its progeny as determining whether the language of the decree can

district court had jurisdiction to decide the compliance issue.[15]

III.

SUBSTANTIAL COMPLIANCE

A. *The Commonwealth*

The district court found that 68 members of the class from Delaware County and six members from Montgomery County are not receiving the habilitative services mandated under the FSA. In particular, these

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support the construction urged by the nonprevailing party below). And while a court should consider reasonable alternative semantic references advanced by the parties, the court should not demote the written word to a reduced status. *See Mellon Bank v. Aetna Business Credit, Inc.*, 619 F.2d 1001, 1013 (3d Cir. 1980). Because the Appellants' proffered reading of the FSA would either give no effect to the plain language of the agreement calling for the permanency of the provisions contained in Appendix A, or else conflict with language in ¶14 to the effect that the Appendix A obligations are legal and subject to Federal Rule of Civil Procedure 60(b), as well as read the qualifying word "active" right out of the agreement, we find that the Appellants' construction is untenable. Since no other possible reading is before us, we believe that the FSA is unambiguous in calling for the continuing jurisdiction of the district court over its Appendix A orders.

15. As a result of our analysis, we need not address the alternative basis on which the court exercised jurisdiction over this matter, i.e., the December 2, 1986 amendment's alleged extension of the time period over which the court retained jurisdiction.

Furthermore, we do not find that the 30 day notice provision of ¶18 speaks to the question of *jurisdiction* such that it would bar the district court from reaching the compliance issue as Montgomery County asserts. Paragraph 18 memorializes certain promises the parties have made to each other; it does not deal with the power of the federal courts. Montgomery County is the only Appellant to raise this issue, and although the County only phrases its argument in terms of jurisdiction, we also do not believe that the district court erred in failing to dismiss the Appellees' claim against

members have either not been provided with Transitional Individual Habilitation Plans ("TIHPs"), Individual Habilitation Plans ("IHPs"), proper placement in accord with individualized habilitation plans, or, in some cases, adequate staff support, treatment, recreational and social activities, medical care, and occupational and speech therapy. App. at 809-811. In addition, the court found that there is an inadequate number of county case managers to service the needs of class members from Delaware County. App. at 810. The district court concluded that the Commonwealth is jointly responsible with the Counties for these deficiencies under ¶¶A1-A4 of Appendix A, as well as responsible for inadequate monitoring of the Counties with regard to the formation and implementation of TIHP's, and the provision of habilitative and other services. App. at 813-14.

Montgomery County based on the substantive contractual provision. Clearly, the parties did not intend ¶18 to allow the counties to surreptitiously hide their noncompliance and bide their time until "caught" by the Appellees, and then when "caught" to have an additional 30 days in order to remedy their intentional noncompliance. Rather, the parties' purpose was surely to require the Appellees to notify the counties of problems that the counties themselves might not be aware of so that the problem can get corrected without court intervention. Certainly, the adequate provision of services to the retarded class members is, or should be, a concern and priority with all parties to this litigation. This being the case, the fact that the motion for enforcement was filed in March 1989, the evidentiary hearing was not held until the end of June 1989, and the court's findings were not made until August 1989, shows that the mere lack of notice to Montgomery County was not a sufficient spur to remedial action. Indeed, to our knowledge the County was still not in compliance at the time of oral argument in March 1990, approximately one year later. Thus, under these circumstances, to dismiss this action as to Montgomery County and require the Appellees to provide the County with notice and then wait 30 days before instituting suit would serve no contractual or just purpose.

The Commonwealth contends that it is in compliance with the FSA. First, the Commonwealth argues that as a matter of basic contract law, existing state law and regulations implicitly form part of every contract. Since state law puts the responsibility on the Counties for placing retarded individuals into the community, the Commonwealth cannot be in violation of the FSA on placement grounds. Second, the Commonwealth argues that even if it is responsible for community placement, the facilities now housing the class members are adequate community living arrangements ("CLAs") under applicable state regulations. Third, the Commonwealth argues that the evidence presented at the hearing shows that it is providing adequate monitoring services. We find none of these arguments persuasive.

While the Commonwealth is correct that a principle of basic contract law is that statutory and regulatory provisions of the state in which the contract is executed or performed become a part of the contract, this expression of the rule is incomplete. One plain and obvious exception to this broad principle is where the contract discloses a contrary intention. *See* 17 Am. Jur. 2d *Contracts* § 257, 656 & n.3 (1964) (cases cited therein); 17A C.J.S. *Contracts* § 330 (1963). *See, e.g., Skandia America Reinsurance Corp. v. Schenck*, 441 F. Supp. 715, 724 (S.D.N.Y. 1977) ("Unless the contract provides otherwise, the law in force at the time it is entered into becomes a part of the contract") (applying New York law). This exception has been generally recognized by Pennsylvania courts. *See Meneice v. Camp Kadimah Co.*, 157 Pa. Super. 380, 383, 43 A.2d 621, 622 (1945) (where existing law *may* affect a contract, the incorporation of the law into the contract is a matter of the intent of the parties); *Morse v. Maurer*, 35 Pa. Super. 196, 198-99 (1908). *Cf. Commonwealth ex rel. Schnader v. U.S. Fidelity &*

Guaranty Co., 314 Pa. 140, 170 A. 686, 688 (1934) (court should not accept a construction of a contract which would conform to the language of a federal statute when the parties intended to disregard the statute). It is indisputable that the Commonwealth explicitly agreed in Appendix A to be jointly responsible with the Counties for providing CLAs to class members as provided for in their individual habilitation plans, as well as community services necessary to provide them with minimally adequate habilitation. App. at 31. So the fact that, absent the FSA, a different allocation of responsibility might be imposed by state law is irrelevant to our determination whether the Commonwealth is in violation of its voluntarily agreed to obligations under the FSA.

Likewise, the Commonwealth's appeal to state mental health regulations to show that CLAs can range as high as 20 clients per unit, *see* Brief for Appellant Commonwealth at 31, is unavailing. First, even if the argument succeeded it would only establish, at best, that 28 class members from Delaware County, out of the 74 class members cited by the district court as receiving inadequate treatment, have received proper placement, i.e., 12 class members at a 12 bed facility located on the main campus of Elwyn Institute and 16 class members in two eight bed facilities in Aston. App. at 810. And, even as to the class members at the 12 bed facility on Elwyn's main campus the Commonwealth's argument is weak. The Director of Mental Retardation Services for Delaware County, Dr. Steve Chafetz, testified that he made a mistake in advising Delaware County to change the original eight bed facility at the site into a 12 bed facility because "the clients were not able to get the individual care that they got when it was an eight bed facility." App. at 442.

But more importantly, we believe that the Commonwealth misconstrues the import of the district

court's finding. As we read the FSA, the testimony, and the district court's opinion, the Commonwealth and the Counties are required to provide each individual class member community placement when it is called for by the individual's planning process. App. at 31. This individual process includes, *inter alia*, initial TIHPs which specify the services necessary to facilitate an individual's transfer to a residential facility; written IHPs which incorporate the assessments of an interdisciplinary team as to the individual's goals and the habilitative services necessary to meet those goals; and, importantly, approval and monitoring of all plans by the Special Management Unit ("SMU"), a group of Commonwealth employees. App. at 27-28. The district court's finding that 68 Delaware County and six Montgomery County residents are not receiving the community living arrangements mandated by the FSA, is simply a finding that the class members are not being adequately provided with the court-mandated individualized habilitation process, whether that inadequacy is evidenced by a lack of a TIHP, IHP, SMU approved residential placement or IHP required occupational, therapeutic, recreational, social or medical care and treatment. Thus, we agree with the Halderman plaintiffs when they argue that what is at issue in this appeal is not the definition of how many individuals can be housed in a facility before it no longer is a CLA, but whether the class members are all receiving the individual attention and planning that they have a right to under the agreement. The district court found that 74 were not being so provided and none of the Appellants have effectively attacked this finding as clearly erroneous.

Finally, the Commonwealth argues that its monitoring obligations were carried out fully and adequately. The Commonwealth points to the testimony of Vicki Stillman-Toomey, the Regional

Program Manager for the Southeast Region which is responsible for the SMU, to the effect that the SMU completed all 120 on-site visitations to class members as required by the FSA, it monitored up to 100% of the class members until County quality assurance programs were in place and it continues with follow-up and spot check visitations even after the two and a half year period mandated by the FSA. App. at 520-21. However, as we read the district court's opinion, the court found the Commonwealth in violation of its monitoring duties not because of inadequate on-site inspections or its failure to oversee the FSA process, but in its apparent lack of authority to force counties into compliance when deficiencies are identified. As the court explained:

> When deficiencies are identified, the unit notifies the involved County officials, attempts to persuade them to take corrective action, and follows up to determine if corrections are made. When "jawboning" fails, the Unit perceives itself as powerless to obtain compliance. The Special Management Unit has apparently never undertaken any other measures to correct a county's failure to supply the habilitation to which a class member is entitled pursuant to the Settlement.

App. at 814. The district court quite naturally interpreted "monitoring" to include not just note-taking, but corrective action if necessary. Thus, the district court found the Commonwealth in substantial noncompliance with its monitoring obligations because it never took any enforcement steps, beyond persuasion, to correct the large number of problems its on-site, and other, inspection visits have revealed. This factual finding is clearly supported by both the testimony of Vicki Stillman-Toomey, *see*

App. at 561-67, and Philip S. Briscoe, the Director of the SMU, *see* App. at 209-215.[16]

B. *Montgomery County*

The district court found that six out of the original 200 residents of Pennhurst from Montgomery County are not being provided the habilitative services mandated by the FSA. Montgomery County does not dispute this finding; instead, the County argues that because 97% of its class members have been provided with adequate services, it is in substantial compliance with the FSA. We disagree.

While the original suit in this case was a class action, the obligations of the Commonwealth and the Counties under the FSA clearly run to class members as individuals, not as a group. Indeed, the entire thrust of the FSA is a promise by the Commonwealth and the Counties to treat the class members as unique individuals with different needs and habilitative requirements. For example, the IHP is supposed to be an individualized treatment program "based upon an . . . assessment of an *individual's* strength and needs . . . set[ting] forth specific short and long term goals

16. The Commonwealth also argues in its brief that it provided the advocacy services and case manager training required under the FSA. *See* Brief for Appellant Commonwealth at 33. This would appear to be simply a mistaken carry over of its identical arguments found in the Commonwealth's Post-Hearing Brief in Opposition to Plaintiffs' Motions for Enforcement, Further Orders and Extensions of the Final Settlement Agreement, App. at 742, since we searched in vain for a finding by the district court that the Commonwealth was in substantial noncompliance on these grounds. Nor do we believe that the court could have found noncompliance on these grounds because the advocacy requirement does not appear in Appendix A and from our review of the record there was insufficient evidence presented at the hearings to support a finding that the Commonwealth provided *inadequate training* of case managers.

and objectives for the person's habilitation and specifiying] the services and the methods for delivering them which are necessary to the *individual's* habilitation," App. at 28 (emphasis added); all professional decisions must be "based upon all information relevant to the habilitation and placement of the *individual*," App. at 29 (emphasis added); and the requirement of a CLA is tied to the "*individual* planning process," App. at 31 (emphasis added).

Moreover, the principle advanced by Montgomery County, though not recognized by the County we assume, would appear to allow the County, at least consistently with the FSA, to treat a few retarded class members in any fashion they want so long as they comply with the FSA with regard to a substantial number of other retarded class members. It is safe to say that this inequitable and disconcerting principle is not what the parties contemplated when they agreed to the FSA, it is not within the specific language of the agreement, and it certainly is not part of the spirit with which the parties resolved this troublesome litigation. It is the individual rights of retarded individuals the FSA seeks to protect not some class construct. Therefore, we agree with the district court that substantial compliance must be measured with respect to the services each *individual* retarded class member is receiving and not with respect to the services received by the class as a whole.

C. *Delaware County*

The district court found that 68 former residents of Pennhurst from Delaware County are not receiving the habilitative services mandated by the FSA. Delaware County does not contest this finding, but instead argues that under ¶13 of the FSA its obligations are expressly conditioned on complete funding by the Commonwealth. Since the County

alleges that the Commonwealth has failed to adequately fund the placement programs mandated by the FSA, its obligations under Appendix A, it contends, are tolled and thus it cannot be in substantial noncompliance with the agreement.

This argument is not unappealing, since the Commonwealth seems to implicitly concede that it might not be giving Delaware County enough money both to fund services for the plaintiff class of retarded individuals and to maintain the same level of services for the nonplaintiff class of retarded individuals already receiving aid from Delaware County. *See* Brief for Appellant Commonwealth at 28-29. Nevertheless, we do not believe that Delaware County's argument is valid as a defense to an enforcement action by the Appellees.

Paragraph 13 of the FSA reads in relevant part: "The obligation of the County Defendants to provide services under this [FSA] is conditioned upon the provision by the Commonwealth Defendants of complete funding for such services . . . . " App. at 22. Thus, under the terms of ¶13, Delaware County must satisfy its obligations under the FSA *if* the Commonwealth gives it enough money to fund the services *mandated by the FSA*. From the testimony at the hearing, there was no dispute that had Delaware County used the general community residential funding provided by the Commonwealth to satisfy its obligations under the FSA first, the funds would have been sufficient to meet the habilitation needs of all the class members. App. at 485 (testimony of Dr. Chafetz). In our view, this is all that the language of ¶13 requires. It does not mandate any specific funding level for the nonplaintiff class of retarded individuals, in addition to complete funding for class members.[17]

17. Paragraph 13 seems to be the counterpart to ¶17 which allows the Commonwealth to petition the court and avoid its

Thus, we find that ¶13 does not provide Delaware County with a valid defense to an enforcement action by the Appellees as to its joint obligations under Appendix A. We caution that our holding does not mean that Delaware County does not have a legitimate action directly against the Commonwealth, either under some contractual provision in the FSA or some other statutory source, in order to obtain complete funding for the plaintiff class and the maintenance of existing funding levels for the nonplaintiff class of retarded individuals. We simply hold that a claim that general funding from the Commonwealth has been insufficient to meet a county's mental health needs cannot be used to avoid that county's obligations under the FSA.[18]

IV.

To summarize, we agree with the district court that under the plain terms of the FSA, the district court had jurisdiction to enforce violations of its orders in Appendix A. In addition, we find no errors in the district court's determination that the Commonwealth, Montgomery County and Delaware County are all in substantial noncompliance with the terms of Appendix A. Costs taxed against the Appellant in each of the appeals.

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obligations under the FSA if the General Assembly either fails to appropriate sufficient funds to implement the FSA or fails to increase funding for community services equal to or greater than the funding saved by closing Pennhurst. No arguments were made to the district court, or this Court, that either of these events had occurred.

18. We observe that ¶¶B10-B13 of the FSA appears to set up "final and binding" arbitration as the way to settle any funding disputes between the Commonwealth and the Counties.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TERRI LEE HALDERMAN, et al.	:	CIVIL ACTION
V.	:	
PENNHURST STATE SCHOOL AND HOSPITAL, et al.	:	NO. 74-1345

O R D E R

AND NOW, this 28th day of August, 1989,

IT IS ORDERED: The motion of the Commonwealth defendants to dismiss all outstanding motions is DENIED;

IT IS FURTHER ORDERED: The Court having found that the Delaware County defendants, the Montgomery County defendants and the Commonwealth defendants are not in substantial compliance with the provisions of the Final Settlement Agreement and the decrees of this Court entered pursuant

to the Settlement Agreement, it is ORDERED that the Delaware County defendants, the Montgomery County defendants and the Comonwealth defendants shall on or before March 1, 1990 comply with all provisions of the Final Settlement Agreement approved by this Court on April 5, 1985, and the decrees of this Court entered on April 5, 1985, in every and all matters wherein this Court found in its Memorandum of August 28th, 1989, said defendants were not in substantial compliance with the Final Settlement Agreement approved by this Court on April 5, 1985, and the decrees of this Court entered on April 5, 1985;

IT IS FURTHER ORDERED: The following provisions of the Final Settlement Agreement approved by this Court on April 5, 1985, including the

Appendices and amendments thereto and the decrees of this Court entered on April 5, 1985, shall remain in full force and effect notwithstanding any language contained therein calling for earlier expiration: Paragraphs 10, 12-16, 18, 21, A5(b), A5(c), A5(e), and A8 until such time as the Court finds that the Delaware County defendants, the Montgomery County defendants and the Commonwealth defendants are in substantial compliance with all applicable provisions of the said agreement and decrees.

IT IS FURTHER ORDERED: The following reports shall be provided to the Court on or before the 5th day of each month. The first of said reports shall be due on October 5, 1989 and the final reports shall be due on March 5, 1990.

1) A report from the Delaware County defendants and the Commonwealth defendants setting forth the progress being achieved to comply with the Final Settlement Agreement and the decrees of this Court as to the 68 members of the class concerning whom the Court found that the Delaware County defendants and the Commonwealth defendants are not in compliance and, in addition, the report shall set forth the progress in reducing the caseloads of the Delaware County case managers.

2) A report from the Montgomery County defendants and the Commonwealth defendants setting forth the progress being achieved to comply with the Final Settlement Agreement and the decrees of this Court as to the six members of the class concerning whom the Court found that the Montgomery County defendants and the Commonwealth defendants are not in compliance.

/s/
RAYMOND J. BRODERICK, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TERRI LEE HALDERMAN, et al.	:	CIVIL ACTION
V.	:	
PENNHURST STATE SCHOOL AND HOSPITAL, et al.	:	NO. 74-1345

MEMORANDUM

Broderick, J. August 28, 1989

Once again there is litigation in the Pennhurst case. Motions have been filed to enforce the settlement approved by this Court on April 5, 1985.

This case was actively litigated for eleven years. It produced 28 published opinions and three arguments before the United States Supreme Court. On April 5, 1985, this Court approved a Settlement Agreement and entered a consent decree. In approving the settlement it was pointed

out that when the action was tried in 1977, all parties were in agreement that Pennhurst as an institution was inappropriate and inadequate for the habilitation of the retarded. No one took issue with the many professionals who testified that "normalization" (the antithesis of institutionalization) is now universally accepted as the only successful method of habilitating a retarded person. Normalization requires that a retarded person must be care for, trained and educated in a normal community environment. The settlement of the Pennhurst case was more than just the termination of eleven years of litigation. The settlement was hailed throughout the nation as recognition that the retarded have a right to minimally adequate habilitation in the least restrictive environment.

The empirical evidence has vindicated the opinions of the retardation experts that institutionalization at Pennhurst was not providing adequate habilitation. The transfers from Pennhurst to community living arrangements have enabled the retarded to develop their capabilities, enjoy a fuller life and in some instances become self-supporting residents in the community.

When the settlement was approved in April of 1985, 435 retarded individuals remained at Pennhurst, 719 having been previously transferred to Community Living Arrangements pursuant to this Court's orders.

Pursuant to the Settlement Agreement, the Commonwealth and County defendants agreed to provide community living arrangements to those members of

the plaintiff class for whom such placement is deemed appropriate by the individual planning process, together with such community services as are necessary to provide each person with minimally adequate habilitation, until such time as the retarded individual no longer is in need of such living arrangements and/or community services. The defendants agreed to provide residential and habilitative services to all persons who have been furnished with such services pursuant to prior orders of this Court. The defendants also agreed to develop and provide a written habilitation plan, formulated in accordance with professional standards, to each member of the plaintiff class; provide an individualized habilitation program to each member of the plaintiff class; and permit each class member and

his family or guardian to be heard in connection with his or her program. The defendants further agreed to provide an annual review of each person's individualized habilitation program, and to monitor the services and programs provided to the class members in accordance with a detailed, professionally-established monitoring and visitation procedure. It was further agreed that all persons provided with services under the terms of the agreement shall be afforded: (1) protection from harm; (2) safe conditions; (3) adequate shelter and clothing; (4) medical, health-related, and dental care; (5) protection from physical and psychological abuse, neglect, or mistreatment; (6) protection from unreasonable restraints and the use of seclusion; and (7) protection from

the administration of excessive or unnecessary medication. The agreement mandated that no retarded person shall be transferred from Pennhurst solely to meet a timetable.

The functions of the Hearing Master were to be discontinued upon approval of the settlement and in place of the Hearing Master, an independent neutral retardation professional, agreed upon by the parties was to be retained by the Commonwealth.

The Settlement Agreement also provided that the definition of the plaintiff class would be amended to provide that persons who were on the waiting list for placement at Pennhurst (and who had not received any habilitative services under any prior orders of this Court), as well as those persons who "may be placed" at

Pennhurst, would no longer be considered members of the plaintiff class, and that their claims would be dismissed pursuant to Fed. R. Civ. P. 41 without prejudice to their asserting any claims which they may have had in any court of competent jurisdiction.

Finally, the settlement agreement specifically provides that this Court shall retain active jurisdiction until July 1, 1989, and that as of that date this action shall be marked closed, provided, of course, that at that time all defendants are in compliance with the agreement. On December 2, 1986, this court approved an agreement by the plaintiffs and the Philadelphia and Commonwealth defendants to amend the Settlement Agreement by extending the date for the closing of Pennhurst until October 21, 1986. (A stipulation was

filed on October 1, 1987, to extend the closing date until October 26. Pennhurst was finally closed on October 27, 1987). This amendment also extended the time for this Court's active supervision of the terms of the agreement as to the Commonwealth and Philadelphia County defendants from July 1, 1989, to a date in 1990.

Plaintiff Association for Retarded Citizens/Pennsylvania filed motions which were joined in by plaintiffs Halderman et al. for "Enforcement, Further Orders and Extension of the Final Settlement Agreement" as to the Delaware County, Montgomery County and Commonwealth defendants.

It should be noted that a motion was filed to enforce the settlement against Philadelphia County

defendants. The Court on April 6, 1988, pursuant to a stipulation of the parties, appointed a team of experts to review and make recommendations concerning the retardation services to class members in Philadelphia. The Expert Team filed its report on July 29, 1988. The Philadelphia County defendants on June 20, 1989, moved to have the Commonwealth defendants held in contempt and to enforce the Final Settlement Agreement with respect to Philadelphia class members. The Court has scheduled a hearing to determine whether the Commonwealth and Philadelphia County defendants are in compliance with the settlement.

This Court held hearings over a period of four days between June 21st and July 6,1989 in connection with the motions to enforce the Settlement Agree-

ment as to the Delaware County defendants, the Montgomery County defendants and the Commonwealth defendants. On the basis of the evidence presented at these hearings, the Court finds that the Delaware and Montgomery County defendants and Commonwealth defendants are not in substantial compliance with the provisions of the Settlement Agreement and the judgments entered by the Court pursuant to Appendix A of the Settlement Agreement. The Court finds that the Delaware County defendants and the Commonwealth defendants are not in substantial compliance in that:

1. Ten class members from Delaware County reside at Embreeville Center, a commonwealth institution which houses about 300 individuals. These ten class members do not have Individual

Habilitation Plans and have not been provided the community living arrangements mandated by the Settlement.

2. Eleven class members from Delaware County reside at Woodhaven, a 250 bed, Intermediate Care Facility. Not one of the eleven has an Individual Habilitation Plan and they have not been provided with the community living arrangements mandated by the Settlement.

3. Seventeen members of the class from Delaware County reside at Elwyn Institute, a large institutional type facility. Two of the 17 do not have Individual Habilitation Plans. These seventeen members of the class have not been provided with the community living arrangements mandated by the Settlement.

4. Two members of the class from Delaware County are presently

residing at Pine Hill, an institutional type facility with a capacity of 158 beds which has been described by the Special Management Unit of the Commonwealth as a facility with inadequate staffing, no active treatment, no recreational, social or religious opportunities and an unreliable fire alarm system. These two members of the class have not been provided with the community living arrangements mandated by the Settlement.

5. Twelve class members from Delaware County reside in a 12 bed facility located on the main campus of Elwyn. This facility is inadequate for the habilitatoin of more than eight residents. These twelve members of the class have not been provided with the community living arrangements mandated by the Settlement.

6. Sixteen members of the class from Delaware County reside in two eight bed facilities in Aston. These facilities do not provide adequate habilitation in that there have been unexplained injuries to class members and the class members are receiving inadequate occupational and speech therapy, inadequate medical care and improper administration of psychotropic drugs. These sixteen members of the class have not been provided with the community living arrangements mandated by the Settlement.

7. Nine county case managers are handling 570 retarded individuals in Delaware County. This is an average of 63 persons for each case manager. This is in violation of the Settlement Agreement and the court decree entered under Appendix A which mandate that the case-

loads shall not exceed about 30 persons for each case manager.

As the Court has found, 68 members of the Pennhurst class from Delaware County are not receiving the habilitation mandated by the Settlement Agreement and the decrees of this Court. It is regrettable that in Delaware County where there are only 191 residents in the Pennhurst class, more than one third of them (68) have been denied the habilitative services mandated by the Settlement. It would appear that the Delaware County Defendants and the Commonwealth Defendants have been proceeding in total disregard of the terms of the Settlement Agreement.

The Court also finds that the Commonwealth Defendants and Montgomery County Defendants are not in substantial

compliance with the Settlement Agreement and/or the judgment orders of this Court as set forth in Appendix A as follows:

1. Two class members from Montgomery County are in Woodhaven although placements in community living arrangements have been recommended. These two members of the class have not been provided with the community living arrangements mandated by the Settlement.

2. Three class members reside at Pine Hill which as heretofore found by the Court is an institutional type facility with 158 beds which has been described by the Special Management Unit of the Commonwealth as having inadequate staffing, no active treatment, no recreational, social or religious opportunities and an unreliable fire alarm system. These three members of the class have not been provided with

the community living arrangements mandated by the Settlement.

3. One member of the class is residing at a Comfort Home which is a private licensed facility with 30 to 40 beds. This person is not receiving the community living arrangements mandated by the Settlement.

The Court finds that Montgomery County defendants and the Commonwealth defendants have been providing the habilitation mandated for all the members of the class from Montgomery County with the exception of the two class members at Woodhaven, the three class members at Pine Hill and the one class member in a Comfort Home. This means that only six of the 200 class members from Montgomery County are being denied the habilitative services mandated by the Settlement. This is

indeed commendable. However, although 97% of the Pennhurst class members from Montgomery County are receiving the habilitation ordered by the Court pursuant to the Settlement Agreement, the Court must find that Montgomery County is not in "substantial compliance." As long as one member of the class is being denied the habilitative services to which he or she is entitled pursuant to the Settlement, there is not substantial compliance.

On the final day of the hearings, the Commonwealth defendants filed a motion to dismiss all outstanding motions against them on the ground that since there had been no finding prior to July 1, 1989, that they were not in compliance with the Settlement Agreement, this Court lacked jurisdiction to proceed against them. As

heretofore pointed out, the date of July 1, 1989, set forth in paragraph 16 of the Settlement Agreement was extended to a date in 1990 pursuant to the parties' amendment to the Agreement on December 2, 1986. Furthermore, even assuming July 1, 1989, was a crucial date, the Commonwealth defendants completely ignore the fact that the plaintiffs' motions claiming violations of the Settlement were filed in March, 1989. In addition, paragraph 14 of the Settlement Agreement specifically provides that the Court's orders as provided in Appendix A "shall remain in effect permanently."

The injunctive decree in Appendix A requires that both the Commonwealth and the County defendants shall provide each class member with individual plans and services as

provided in the Final Settlement Agreement. As found by the Court, this has not been done by the Delaware County defendants, the Montgomery County defendants and the Commonwealth defendants.

Paragraph A2 of the Court decree requires that the Commonwealth and the Court defendants provide the class members community living arrangements as called for by the individuals's habilitation plan. This has not been done by the Delaware and Montgomery County defendants and the Commonwealth defendants as found by the Court.

Paragraph A4 of the decree requires both the Commonwealth and the County defendants to develop and provide each member of the class with an individual habilitation plan. This has not been done by the Delaware and

Montgomery County defendants and the Commonwealth defendants as found by the Court.

Paragraph A5 of the injunctive decree mandates that the Commonwealth and County defendants "monitor" the services and programs received by the class members.

A Special Management Unit was created by the Commonwealth defendants. Its function is defined in the Settlement Agreement as:

> A unit of Commonwealth employees whose responsibilities include but are not limited to review and approval of plaintiff class member's Transitional Individual Habilitation Plans and the monitoring of the provision of services to mentally retarded individuals.

Its staff consists of a director, three monitors, three advocates and support staff.

The three monitors conduct about 120 on-site inspections each per year, in addition to visits conducted concerning incidents of death, abuse or harm. In performing its monitoring mission, the Special Management Unit regularly discovers deficiencies in the services planned for or provided to individual class members. "Jawboning," however, is the only technique employed to obtain compliance by the County defendants with settlement. When deficiencies are identified, the unit notifies the involved County officials, attempts to persuade them to take corrective action, and follows up to determine if corrections are made. When "jawboning" fails, the Unit perceives itself as powerless to obtain compliance. The Special Management Unit has apparently never undertaken any

other measures to correct a county's failure to supply the habilitation to which a class member is entitled pursuant to the Settlement.

Although negotiated by the parties, a consent decree is a judgment of the court the violation of which is punishable by contempt sanctions. Interdynamics, Inc. v. Firma Wolf, 653 F.2d 93, 96-7 (3d Cir. 1981). The Court has the power to enforce consent decrees as it does any other judgments.

As stated in Williams v. Vukovich, 720 F.2d 909 (6th Cir. 1983):

> The terms of the decree, unlike those of a simple contract, have unique properties. A consent decree has attributes of both a contract and of a judicial act. United States v. ITT Continental Baking Co., 420 U.S. 233, 236 n.10 95 S. Ct. 926, 934 n. 10, 43 L.Ed.2d 148 (1975); Stotts [v.Memphis Fire Department], 679 F.2d [541] at 556 [6th

Cir. 1982]. On the one hand, a consent decree is a voluntary settlement agreement which could be fully effective without judicial intervention. See [United States v.] City of Miami, 664 F.2d [435] 439-40 [5th Cir. 1981) (en banc)]. In this sense the decree merely memoralizes the bargained for position of the parties. See United States v. Armour & Co., 402 U.S. 673, 681, 91 S. Ct. 1752, 1757, 29 L.Ed.2d 256 (1971). . . .

A consent decree, therefore, should by strictly construed to preserve the bargained for position of the parties. . . .

A consent decree, however, is also a final judicial order. See Carson [v. American Brands], 450 U.S. [79] 84, 101 S. Ct. [993,] 996 [1981]; United States v. Kellum, 523 F.2d 1284, 1287 (5th Cir. 1975); Stotts, 679 F.2d at 557. Judicial approval of a settlement agreement places the power and prestige of the court behind the compromise struck by the parties. See Stotts, 679 F.2d at 557; City of Miami, 664 F.2d at 441.

720 F.2d at 920. As heretofore pointed out, this Settlement Agreement and the consent decree were approved by this court in a 31 page Memorandum which concludes:

> This settlement is more than just a termination of litigation; it is the beginning of a new era for retarded persons. It is a confirmation that all parties to this litigation are now in complete agreement that the retarded citizens of this Commonwealth have a right to care, education and training in the community. It is a recognition by the Commonwealth and its counties that retarded persons are not subjects to be warehoused in institutions, but that they are individuals, the great majority of whom have a potential to become productive members of society.

610 F. Supp. at 1233-34. The Court's order of April 5, 1985, provides:

> IT IS HEREBY ORDERED that the Final Settlement

> Agreement is APPROVED, and IT IS FURTHER ORDERED that the provisions of the Final Settlement Agreement executed on July 12, 1984 heretofore made a part of the record in this case shall have the full force and effect of an Order of this Court.

The Settlement of this litigation in 1985 propelled the Commonwealth of Pennsylvania into recognition as a leader in habilitation for its retarded citizens. However, it appears that in the past few years there has been a loss of momentum in this Commonwealth for achieving community living arrangements for the retarded. Although the experts in mental retardation agree that adequate habilitation for the retarded cannot be achieved in an institutional setting, the evidence presented at the hearing shows that some members of the Pennhurst

class remain institutionalized. It is also difficult to understand why the Commonwealth defendants contended at this hearing that they have no legal obligation to the members of the Pennhurst class and that this Court is without jurisdiction to enforce the Settlement. For the reasons heretofore pointed out, such contentions by the Commonwealth defendants are not only lacking in merit, they border on the frivolous. The Commonwealth defendants, as well as the County defendants are legally bound by the Settlement which, after approval by this Court on April 5, 1985, became a court order together with the Court's decrees pursuant to Appendix A of the Settlement Agreement.

The Court's initial reaction in this matter was to find that the defendants, have violated the Settlement

as well as the decrees of this Court, should be held in contempt and that sanctions should be imposed. However, after considering that there were more than 1200 residents in Pennhurst when this action was initiated and having been convinced by the empirical studies that the majority of these former Pennhurst residents have achieved substantial gains in their life skills as a result of the defendants' efforts, the Court has determined that the Commonwealth, Delaware and Montgomery County defendants should be given additional time to achieve substantial compliance.